

(2010) 01 GAU CK 0031

In the Gauhati High Court

Case No : Regular Second Appeal No. 167 of 2000

Md. Saukat Ali and Others

APPELLANT

Vs

Musstt. Nekjan Bibi and Others

RESPONDENT

Date of Decision : 25-01-2010

Acts Referred:

Evidence Act, 1872 — Section 67, 68
Registration Act, 1908 — Section 58

Citation : (2010) 5 GLR 311 : (2010) 2 GLT 820

Hon'ble Judges : Brojendra Prasad Katakey, J

Bench : Single Bench

Advocate : B.K. Ghosh, N. Chakravorty and C. Goswami, for the Appellant; H.K. Deka and N.G. Goswami, for the Respondent

Judgement

B.P. Katakey, J.—This appeal by the defendants is directed against the judgment and decree dated 23.6.2000 passed by the learned Civil Judge (Sr. Division), Darrang at Mangaldoi in Title Appeal No. 12/1998 allowing the appeal by decreeing the suit of the plaintiffs/respondents and by setting aside the judgment and decree dated 12.5.1998 passed by the learned Civil Judge (Jr. Division), No. 1, Darrang at Mangaldoi in Title Suit No. 23/1996, whereby and whereunder the plaintiffs' suit was dismissed.

2. The plaintiffs/respondents instituted Title Suit No. 23/1996 in the court of the learned Civil Judge (Jr. Division), No. 1 (now Munsiff), Mangaldoi for declaration of right, title and interest over the land measuring 2 Bighas, 4 Kathas, 31/2 Lechas described in Schedule Ka(2), which is half of the land measuring 5 Bighas, 3 Kathas, 7 Lechas pertaining to Dag No. 293 of Kheras Periodic Patta No. 135 of village Satkhali under Sipajhar Mouza described in Schedule-Ka and land measuring 2 Kathas 1/2 Lecha described in Schedule-Kha(2), which is half of the land measuring 4 Kathas, 1 Lecha pertaining to Dag No. 500 of Kheras Periodic Patta No. 140 of village Satkhali, Mouza Sipajhar; for declaration that the registered deed of sale No. 1074 dated 18.4.1996 purportedly executed by

the plaintiffs/respondent Nos. 1 and 2 in favour of the defendants/appellant Nos. 1 and 2 transferring 2 Bighas, 2 Kathas, 8 Lechas of land in Dag No. 293 of Kheras Periodic Patta No. 135 and 1 Katha, 12 Lechas in Dag No. 500 of Kheras Periodic Patta No. 140 of village - Satkholi under Sipajhar Mouza totaling 2 Bighas, 4 Kathas, as fraudulent and for cancellation and also for partition, alleging inter alia that the entire land described in Schedules-Ka and Kha measuring 5 Bighas, 3 Kathas, 7 Lechas and 4 Bighas, 1 Lechas, respectively, originally belong to the grand-father of the plaintiff Nos. 1 and 2, Bhoboka Sheikh and after his death their sons Sahar Ali and Mucha Sheikh, being the only heirs inherited the said property in equal shares. It has further been pleaded in the plaint that Sahar Ali left behind 2 (two) sons, namely Naimuddin and Saukat (defendant No. 1) and after the death of Naimuddin, the portion of the land over which he acquired title by right of inheritance devolved on the defendant Nos. 3 to 6. The further case of the plaintiffs in the plaint is that after the death of Mucha Sheikh, the second son of Bhoboka Sheikh, the plaintiff Nos. 1 and 2 inherited his share of property. According to the plaintiffs, they being the heirs of Mucha Sheikh, who inherited half of the property left behind by Bhoboka Sheikh, are entitled to half share on the land described in Schedules Ka and Kha to the plaint. The further case of the plaintiffs is that the plaintiffs' names were mutated alongwith the names of other heirs of Bhoboka Sheikh in the revenue records and the plaintiffs and the defendant Nos. 1 and 3 to 6 are jointly possessing the land, which they got by the right of inheritance, but the defendant Nos. 1 and 3 to 6 though with the understanding of giving the share of the crop was allowed to occupy the land with further condition that whenever the plaintiffs demand the possession they will vacate it, they refused to vacate, the land belonging to the plaintiff Nos. 1 and 2 and in the guise of execution of a deed for handing over the possession, the defendant Nos. 1 and 2 took the plaintiff No. 1 to Mangaldoi on 18.4.1996 and obtained her thumb impression on a sheet of paper wherein the mother of the defendant No. 2 put her thumb impression on behalf of the defendant No. 2. According to the plaintiff No. 1, she was given the impression that by that document the possession of the property belonging to the plaintiff Nos. 1 and 2 will be handed over and though they demanded the possession, they have been told that their share has been sold in favour of the defendant Nos. 1 and 2 on 18.4.1996. The plaintiffs have stated in the plaint that they never sold the land as shown to have been sold by the registered deed dated 18.4.1996.

3. The defendant Nos. 1, 2, 7, 8 and 9 contested the suit by filing joint written statement. The defendant Nos. 3 to 6 have also filed the joint written statement, however, supporting the case of the plaintiffs. In the joint written statement filed by the contesting defendant Nos. 1, 2, 7, 8 and 9 (the appellants in the present appeal) while admitting that the Schedule-Ka land originally belonged to the grand-father of the defendant No. 1 and the plaintiff Nos. 1 and 2 and the land described in Schedule-Ka(2) and Kha(2) have been inherited by the plaintiffs, after the death of their father Mucha Sheikh, who was the son of Bhoboka Sheikh,

the said land was under the care of the defendant Nos. 1 and 2, which was, however, subsequently transferred by the plaintiff Nos. 1 and 2 in their favour by a registered deed of sale.

4. On the basis of the pleadings of the parties, the following issues were framed by the learned trial court for consideration and decision:

- (1) Whether there is cause of action for the Suit ?
- (2) Whether the suit is barred by limitation ?
- (3) Whether the plaintiffs have got right, title and interest over the suit land ?
- (4) Whether the registered sale deed No. 1074 dated 18.4.1996 was obtained by principal defendant by practising fraud and therefore, liable to be cancelled ?
- (5) Whether the Plaintiffs are entitled for the relief prayed?
- (6) To what/other relief, reliefs, the parties are entitled ?

5. While the plaintiffs have examined 4(four) witnesses, which includes the plaintiff No. 1 as PW-3 and proved 4(four) documents, which includes the disputed registered deed of sale No. 1074 dated 18.4.1996, the defendants have examined 5(five) witnesses, which includes the defendant Nos. 1 and 2 and proved the disputed sale deed dated 18.4.1996 as Exhibit-Ka.

6. The learned trial court, upon appreciation of the evidences on record vide judgment and decree dated 12.5.1998 dismissed the suit of the plaintiffs by deciding the issue No. 4, which relates to the question as to whether the alleged sale deed was obtained by practicing fraud and, therefore, liable to be cancelled, in the negative and against the plaintiff and consequently by holding that after such sale, the right of the plaintiff Nos. 1 and 2 in respect of the land comprised in Schedule-Ka(2) and Kha(2) has extinguished.

7. Being aggrieved, the plaintiffs filed Title Appeal No. 12/1998 in the court of the learned Civil Judge, Sr. Division, No. 1 (now Civil Judge), Mangaldoi. The learned First Appellate Court, upon hearing the learned Counsel for the parties and upon perusal of the evidences on record decreed the suit of the plaintiffs by holding that the sale deed dated 18.4.1996 (Exhibit)-3, which has also been proved as Exhibit-Ka was fraudulent and execution of the said deed could not be proved by the contesting defendants and has also declared the right, title and interest of the plaintiffs over the land comprised in Schedule-Ka(2) and Kha(2) by decreeing the suit of the plaintiffs. Hence, the present appeal.

8. While admitting the appeal vide order dated 27.11.2000, the following substantial questions of law were framed:

- (i) Whether the learned Civil Judge (Senior Division) Darrang, Mangaldoi misconceived the law relating to the mode of proof of a document and held wrongly that the contents of a sale deed can be proved by examining the attesting witnesses only and no other way ignoring the provision of Section 67 of

the Indian Evidence Act ?

(ii) Whether the learned Civil Judge (Senior Division), Darrang, Mangaldoi committed serious illegality by holding that the sale deed was to be proved by examining an attesting witness u/s 68 of the Indian Evidence Act only ?

(iii) Whether the learned Civil Judge (Senior Division), Darrang, Mangaldoi having misconceived the law relating to the proof of sale deed did not take into consideration evidence of the writer and other witness examined by the defendants/appellants in support of the facts that a registered sale deed was duly executed by the plaintiffs/respondents in favour of defendants/appellant Nos. 1 and 2 ?

(iv) Whether the learned lower appellate court committed serious error in law in deciding that the sale deed was fraudulently executed on materials adduced by the plaintiffs/respondents in evidence but which were not pleaded in the plaint ?

9. I have heard Mr. N. Chakraborty, the learned Counsel for the appellants and Mr. H.K. Deka, the learned senior counsel appearing on behalf of the respondent Nos. 1 to 4. None appears for the pro forma respondents/defendant Nos. 5 to 11.

10. The learned Counsel for the appellants with reference to the first and the second substantial questions of law, as formulated vide order dated 27.11.2000, has submitted that the learned First Appellate Court has allowed the appeal by setting aside the judgment and decree passed by the learned trial court on misconception of law as the said court has decreed the suit of the plaintiffs on the ground that the defendants could not prove the sale deed (Exhibit-3/Ka) executed by the plaintiff Nos. 1 and 2 in favour of the defendant Nos. 1 and 2 by examining the attesting witnesses as required u/s 68 of the Evidence Act, though the deed being a sale deed, the provisions of Section 68 of the said Act is not applicable and when the defendants could prove the due execution of such sale deed as required u/s 67 of the said Act, the learned lower appellate court ought not to have set aside the judgment and decree passed by the learned trial court.

11. Relating to the third substantial question of law, it has been submitted by the learned Counsel for the appellants that the defendants by adducing evidence of the scribe and other witnesses to the said sale deed could prove due execution of such deed by the plaintiff Nos. 1 and 2 and thereby discharged their burden of proving as required u/s 67 of the Indian Evidence Act, 1872 and, hence, the learned lower appellate court ought to have held that though the plaintiff Nos. 1 and 2 originally had the title over the land described in Schedule-Ka(2) and Kha(2) of the plaint, the title in respect of the said land stands transferred because of the said sale deed (Exhibit-3/Ka). It has further been submitted that due execution of the sale deed (Exhibit-3/Ka) is to be presumed under the provisions of the Registration Act, 1908, the same having been duly registered and the endorsement relating to execution of such deed by the plaintiff Nos. 1 and 2 having been duly recorded by the registering authority.

12. The learned Counsel for the appellants relating to the fourth substantial question of law has submitted that the allegation of fraud in execution of the deed having been pleaded by the plaintiffs, the burden lies on them to prove that the sale deed was fraudulently executed, which the plaintiffs have miserably failed and as such, the learned lower appellate court ought not to have decreed the suit of the plaintiffs.

13. Mr. Deka, the learned senior counsel appearing for the respondents/plaintiffs, on the other hand, supporting the judgment and decree passed by the learned lower appellate court, has submitted that though presumption can be drawn in respect of due execution of a document when the same is registered under the provisions of the Registration Act, 1908, in view of Section 58 of the said Act, such presumption is rebuttable. According to the learned Counsel, the presumption and the registration does not dispensed with the necessity of proving the execution when the execution of such document is denied. According to the learned senior counsel, the plaintiffs denied due execution of the sale deed (Exhibit-3/Ka) and, hence, the defendants, in view of Section 67 of the Evidence Act, are bound to prove the due execution of the same by proving the thumb impressions of plaintiff Nos. 1 and 2 in such document, which they have failed to do. According to the learned senior counsel, the DW-5, Azizur Rahman, who is the scribe of the said sale deed and who allegedly taken thumb impressions of plaintiff Nos. 1 and 2 in such deed, during cross-examination has stated that he does not know the plaintiff Nos. 1 and 2 personally and as such, the thumb impression of the plaintiff Nos. 1 and 2 in the said document could not be proved by the defendants. No steps have also been taken by the defendants to send the said thumb impressions for examination by the hand writing expert so as to prove that the thumb impressions appeared in such document are of the plaintiff Nos. 1 and 2, submits the learned Counsel, though the burden lies on the defendant Nos. 1 and 2 to prove the due execution of such document. It has further been submitted by the learned senior counsel that it is also evident from the materials available on record that no consideration money has been paid. The learned senior counsel, therefore, submits that the appeal filed by the appellants deserves to be dismissed.

14. I have considered the submissions of the learned Counsel for the parties and also perused the materials available on record including the judgment and decrees passed by the learned courts below.

15. It is evident from the pleadings of the parties and evidences adduced, as well as the judgments and decrees passed by the learned courts below that there is no dispute relating to the fact that the land described in Schedule-Ka and Kha to the plaint originally belonging to Bhuboka Sheikh and after his death the same was inherited by his 2(two) sons, namely Sahar and Mucha in equal proportion. It is also not in dispute that the plaintiff Nos. 1 and 2 inherited the property fell into the share of Mucha, one of the sons of Bhuboka Sheikh and the defendant Nos. 1 and 3 to 6 inherited the land fell into the share of Sahar, the defendant

No. 1 being the son of Sahar and defendant Nos. 3 to 6 being the sons of Naimuddin, who was another son of Sahar. The defendants have also not disputed and rather admitted that the plaintiff Nos. 1 and 2 have acquired title in respect of the land measuring 2 Bighas, 4 Kathas, 31/2 Lechas described in Schedule Ka(2) and 2 Kathas and 1/2 Lechas by described in Schedule Kha(2) totalling 3 Bighas 1, Katha 4 Lechas by right of inheritance, after the death of their father Mucha Sheikh, who was one of the sons of Bhoboka Sheikh. The case of the contesting defendants is that though the plaintiff Nos. 1 and 2 acquires the title in respect of the Schedule Ka(2) and Kha(2) land, their title extinguished as they have transferred the said land by a registered deed of sale dated 18.4.1996 (Exhibit-3/Ka). The title of the plaintiff No. 2 in respect of Schedule Ka(2) and Kha(2), prior to the alleged sale deed dated 18.4.1996, therefore, is not in dispute.

16. The questions, which require determination in the present appeal, therefore, are whether the defendant Nos. 1 and 2 could prove the due execution of the sale deed (Exhibit-3/Ka) and whether the said sale deed was fraudulently obtained.

17. The learned First Appellate Court though has held that the sale deed (Exhibit-3/Ka) was fraudulently obtained, it, however, has wrongly applied the provision of Section 68 of the Evidence Act, in holding that since none of the attesting witness to the deed has been examined to prove the due execution, the defendants failed to prove the execution of such deed. The learned lower appellate court, however, at the same time has held that the defendant Nos. 1 and 2 have failed to discharge the burden on proving the due execution of such sale deed.

18. Exhibit-3/Ka being deed of sale, the same is not required to be attested by any attesting witness under the law. Hence, Section 68 of the Evidence Act cannot be applied in the matter of proof of execution of the sale deed, as the said document is not required by law to be attested.

19. In the case in hand, the plaintiff Nos. 1 and 2 having denied the execution of the sale deed (Exhibit-3/Ka), the burden lies on the contesting defendants to prove that such, sale deed was signed or the plaintiff Nos. 1 and 2 put their thumb impressions on such document, in view of Section 67 of the Evidence Act. Though presumption about due execution of a deed registered under the provisions of Registration Act, 1908 is to be drawn, such presumption is always rebuttable. The registration of the document or the issuance of the certificate of the registration under the provisions of the Registration Act, 1908, does not dispense with the necessity of proof of execution when the same is denied, though the endorsement of the registering authority may furnish some evidence about such execution but the same is not conclusive and can always be rebutted.

20. It appears from the pleadings of the plaintiffs in the plaint as well as the evidences adduced in support of such pleading that the execution of the sale

deed (Exhibit-3/Ka) has been denied though the said document has been registered under the provisions of the Registration Act and an endorsement has been made by the registering authority to that effect. Section 67 of the Evidence Act puts the burden on the defendant Nos. 1 and 2, who assert such execution by the plaintiff Nos. 1 and 2, to prove their thumb impressions on such documents. The defendant Nos. 1 and 2 in order to prove such thumb impressions have examined the scribe of the sale deed, namely the DW-5, who though in chief has stated that he took the thumb impressions of the plaintiff Nos. 1 and 2 in the document, during cross-examination he has stated that he does not know the plaintiff Nos. 1 and 2 personally. The DW-5, the scribe, therefore, could not prove that the thumb impressions which were taken by him in the said document are of the plaintiff Nos. 1 and 2. It is also on evidence that the plaintiff No. 2 did not go to Mangaldoi on 18.4.1996 and the mother of the defendant No. 2 put the thumb impression on behalf of the plaintiff No. 2. That being the position, the thumb impression of the plaintiff No. 2 could not be proved by the contesting defendants. Admittedly the land has not been partitioned between the plaintiff Nos. 1 and 2 and hence, even if the plaintiff Nos. 1's thumb impression in the said document is taken as proved, the land being unpartitioned, both the plaintiff Nos. 1 and 2 having joint interest over the land, no title can be passed on to the defendant Nos. 1 and 2 on the basis of the said sale deed being Exhibit-3/Ka, the defendant Nos. 1 and 2 having failed to prove the thumb impression of both the plaintiffs. The question whether the sale deed was fraudulently obtained, in view of the above, need not be gone into.

21. In view of the aforesaid discussion, I am of the view that the decree passed by the learned First Appellate Court needs no interference in second appeal, for the reasons recorded above.

22. The appeal, therefore, is dismissed being devoid of merit. Keeping in view the facts and circumstances of this case, the parties are directed to bear their own cost in the present appeal.